BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLOTTE R. DOHERTY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,420
SPENCER-RANDALL VETERINARY CLINIC	)	
Respondent	)	
AND	)	
	)	
STATE FARM INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 3, 2007, Award entered by Administrative Law Judge Pamela J. Fuller. The Workers Compensation Board heard oral argument on January 18, 2008, in Wichita, Kansas.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an April 7, 2004, accident and resulting low back injury. In the October 3, 2007, Award, Judge Fuller awarded claimant permanent disability benefits for a 40 percent work disability.[1] In making that determination, the Judge found claimant had been terminated on August 16, 2004, *before* she became enraged and left respondent's

[1] A permanent partial general disability greater than the functional impairment rating as defined by K.S.A. 44-510e.

premises. In other words, the Judge found respondent terminated claimant before respondent had cause to terminate her. In finding the 40 percent work disability, the Judge averaged a 21 percent wage loss and a 59 percent task loss.

Respondent challenges Judge Fuller's finding that respondent terminated claimant before she became enraged on August 16, 2004, and left respondent's premises. Accordingly, respondent argues claimant's permanent disability benefits should be based upon her functional impairment as respondent was justified in terminating her employment that would have continued to provide claimant with a comparable wage. Additionally, respondent argues claimant sustained an intervening shoulder injury that caused her wage loss. Therefore, respondent argues claimant's wage loss is not due to her back injury and claimant is not entitled to benefits for a work disability.

In summary, respondent contends claimant's award under K.S.A. 44-510e should be based upon her 10 percent whole person functional impairment. But if the Board determines claimant has a work disability, respondent requests the Board to affirm the Judge's finding of 40 percent.

Claimant also contends the Judge erred. Claimant argues she is entitled to a work disability based upon an 82 percent task loss and the following wage losses: 43.5 percent beginning January 1, 2006 (which would yield a 62.75 percent work disability); 55 percent from January 1, 2007, through July 31, 2007 (which would yield a 68.5 percent work disability); and 77.4 percent beginning August 1, 2007 (which would yield a 79.7 percent work disability).

The only issues before the Board on this appeal are:

1. Should claimant's award of permanent partial disability benefits under K.S.A. 44-510e be limited to her 10 percent whole person functional impairment?

2. If not, what is claimant's work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified to limit claimant's permanent partial disability benefits to her 10 percent whole person functional impairment.

Claimant began working for the respondent veterinary clinic in late 1997 as a veterinarian assistant. Claimant's job entailed cleaning, caring for the animals, and assisting the doctor. There is no dispute that on April 7, 2004, claimant injured her back

while handling a 50-pound bag of horse feed and that her accidental injury arose out of and in the course of her employment with respondent.

After the accident, claimant received 5.71 weeks of temporary total disability benefits. She then returned to work for respondent under restrictions and worked without incident until August 3, 2004, when she injured her left shoulder at work.

The left shoulder injury is not part of this claim. Nonetheless, the shoulder injury is relevant to the outcome of this claim. On Friday, August 13, 2004, claimant first received medical treatment for her left shoulder injury. On Monday, August 16, 2004, claimant became enraged and left respondent's premises after Dr. Dale Holterman, the veterinary clinic's owner, began speaking to her about her injuries and restrictions.

Not surprisingly, the parties have different versions of the August 16, 2004, conversation and what then transpired. Claimant testified she had worked almost the entire day when Dr. Holterman approached her and advised her he could not have her working at the clinic because of her medical restrictions, which at that time included both restrictions for her back and restrictions for her left shoulder. Claimant admits becoming upset and admits saying some things she now regrets. She explained she reacted in such manner as she believed she was going to again incur financial hardship. Claimant testified, in part:

> Q. (Mr. Seiwert) Did you have some words with the doctor about leaving?
>
> A. (Claimant) Yes, I did.
>
> Q. Why did you -- why were you upset?
>
> A. Well, I'd been getting the run around. You need to be here to work, and they were wanting me to go over my restrictions at certain times, but I wasn't going to and they wanted me there, but then they didn't want me there. They cut my hours.
>
> Q. And that's why you were upset?
>
> A. Sorry. (Non-verbal response.)
>
> Q. Okay. And in the course of having those words with the doctor, did you say some things you maybe later regretted?
>
> A. Yes.
>
> Q. I think when you and I talk about it, we used an abbreviation for the word you used. I'm going to ask you to do that now.

A. I asked him what the F I was going to do from now on.

Q. And you remember what his response was to that?

A. Not really.

Q. Do you remember what else you talked to him about, why you were upset at having to leave?

A. About workman comp taking so long to pay me right arm *[sic]*. I'm a single parent.[2]

Dr. Holterman, on the other hand, indicated he did not intend to terminate claimant during their August 16, 2004, conversation. Instead, the doctor intended to tell claimant he needed time to sort things out as she had recently been given restrictions for her shoulder. According to the doctor, before he could explain claimant erupted, became vulgar, slammed doors, and left the clinic. The doctor, however, admits he told claimant to go home during their August 16, 2004, conversation as he did not think it was safe for her to work.

The doctor further explained that he had previously spoken to claimant about her bursts of anger and, therefore, he and his wife (who was the clinic's office manager) determined they should retrieve claimant's key to the clinic. Dr. Holterman then went to claimant's house to retrieve the key, but claimant did not answer the door. Later, a law enforcement officer went to claimant's house and obtained her key to the clinic.

After claimant's outburst, the doctor and his wife concluded claimant should no longer work at the clinic due to her behavior. The doctor, however, testified he intended to retain claimant at the clinic if the August 16, 2004, incident had not occurred. Dr. Holterman testified, in part:

Q. (Mr. Donley) [I]s there any doubt in your mind that you wouldn't have continued to keep her [claimant] in your employment if this would not have happened?

A. (Dr. Holterman) No. There was no other reason to terminate her. And as far as limitations, we were trying to accommodate those.[3]

The doctor's wife and clinic office manager, Karen Holterman, testified she was aware her husband was going to speak with claimant on Monday, August 16, 2004, as she

[2] R.H. Trans. at 14, 15.

[3] Dale Holterman Depo. at 15.

and her husband had learned that during the previous weekend claimant had experienced a third incident at work in which claimant was on the floor of the clinic writhing in pain. Accordingly, Mrs. Holterman indicated she and her husband were concerned about claimant's well being and they intended for claimant to be off work for a while while she healed. Mrs. Holterman also testified about claimant erupting in anger on two previous occasions upon returning to work following her back injury. Nonetheless, Mrs. Holterman testified claimant probably would still be employed by the clinic had the August 16, 2004, incident not occurred.[4]

Mrs. Holterman testified claimant was never actually terminated.[5] Claimant, on the other hand, first testified that she thought she was terminated when the officer came to her house to get her key.[6] And she later testified the officer told her she was no longer employed at the clinic.[7]

Following August 16, 2004, claimant received both medical treatment and temporary total disability benefits for her left shoulder injury. Indeed, in June 2005, claimant underwent left shoulder surgery and in January 2006 she was ultimately released from medical treatment for that injury.

The Board is persuaded that respondent would have continued to accommodate claimant's restrictions had she not erupted on August 16, 2004, and stormed from respondent's premises. Before that incident, Dr. Holterman and his wife had retained claimant in their employment despite the restrictions she had received for her back. The Holtermans had even given claimant $900 following her back injury to help relieve the financial burden she was then undergoing. In short, the Board finds the testimonies of both Dr. Holterman and Mrs. Holterman are credible and persuasive.

As a result of the April 7, 2004, accident, claimant has a left-sided herniated disc between the fifth lumbar and first sacral vertebrae (L5-S1). Both Dr. Paul S. Stein (the court-appointed medical examiner) and Dr. Pedro A. Murati (claimant's medical expert witness) determined claimant sustained a 10 percent whole person impairment under the fourth edition of the AMA *Guides*[8] and that she should observe permanent work restrictions

---

[4] Karen Holterman Depo. at 24.

[5] *Id.* at 26.

[6] R.H. Trans. at 16.

[7] *Id.* at 24.

[8] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

and limitations. Accordingly, the evidence establishes claimant has sustained a 10 percent whole person functional impairment due to her April 7, 2004, accident at work.

Claimant did not work between August 16, 2004, and July 2005. Since that time, claimant has obtained several different jobs, including providing care to an elderly couple and disabled gentleman, and driving a truck. Claimant's vocational expert, Doug Lindahl, believes claimant retains the ability to earn $6 per hour. Respondent's vocational expert, Karen Crist Terrill, believes claimant retains the ability to earn $10 per hour. At the time of the May 2007 regular hearing, claimant was working approximately 15 hours per week providing home care services and looking for other work.

CONCLUSIONS OF LAW

A literal reading of K.S.A. 44-510e would indicate claimant is entitled to receive a permanent partial general disability based upon her wage loss and her task loss. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But the appellate courts have not always followed the literal language of the statute. Instead, the courts have, on occasion, added additional benchmarks for injured workers to satisfy before they become entitled to receive permanent disability benefits in excess of the functional impairment rating. For example, *Foulk*[9] and *Copeland*[10] held that an injured worker must make a good faith effort to work or to find appropriate employment before the worker's actual post-injury wages may be used in the permanent partial general

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

disability formula. And if the injured worker fails to prove good faith to find appropriate work, a post-injury wage must be imputed for that formula.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

Assuredly, the concepts of good faith effort and imputing wages are neither mentioned in K.S.A. 44-510e or any other statute in the Workers Compensation Act.

In *Ramirez*[12], the Kansas Court of Appeals again departed from the literal language of K.S.A. 44-510e and held a worker who had injured his upper extremities was not entitled to a work disability because the worker had failed to disclose an earlier back injury in a pre-employment application. But the Workers Compensation Act contains no provision that an incomplete or erroneous employment application precludes an award of work disability. Indeed, the injured worker in *Ramirez* probably felt the court's holding was especially punitive as the back injury that was not disclosed in the employment application was not related in any manner to the upper extremity injuries he later sustained.

And in *Mahan*[13], the Kansas Court of Appeals held that when an employee has failed to make a good faith effort to retain his or her current employment, *any* showing of the potential for accommodated work at the same or similar wage rate precludes an award for work disability.

> We hold that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the *potential* for accommodation at the same or similar wage rate precludes an award for work disability. It would be unfair under circumstances where the employee has refused to make himself or herself eligible for reemployment to require the employer to show that the employee was specifically *offered* accommodated employment at the same or similar wage rate.[14]

---

[11] *Id.* at 320.

[12] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

[13] *Mahan v. Clarkson Constr. Co.*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* 282 Kan. ___ (2006).

[14] *Id.* at 321.

Again, the Act contains no such provision that failing to make a good faith effort to retain employment is a valid defense to a claim for disability benefits. Conversely, in *Oliver*[15] the Kansas Court of Appeals held that neither K.S.A. 1998 Supp. 44-510e(a) nor Kansas case law required an injured worker to always seek post-injury accommodated work from his or her employer before seeking work elsewhere. And in *Rash*[16], the Kansas Court of Appeals held the offering or accepting of accommodated employment was simply another factor in determining whether the employee had engaged in a good faith effort to seek appropriate employment. The *Rash* decision states, in part:

> Heartland would have us punish employees with a harsher result for not accepting accommodated employment. This argument is contrary to *Oliver*. The lesson from *Oliver* is that an employer is not required to offer accommodated employment. Equally, an employee is not required to accept an offer of accommodated employment from his or her employer. *The offering or accepting of accommodated employment is simply another factor in determining whether the employee has engaged in a good faith effort to seek appropriate employment.* An employee who rejects an offer of accommodated employment has a good faith duty to seek appropriate employment within his or her restrictions. If the employee fails in this effort, "the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." *Copeland*, 24 Kan. App. 2d at 320.[17]

The Kansas Supreme Court, however, has recently sent two strong signals that the Workers Compensation Act should be applied as written. In *Graham*[18], the Kansas Supreme Court rejected an interpretation of the wage loss prong in the work disability formula that did not comport with the literal reading of K.S.A. 44-510e. The Kansas Supreme Court wrote, in part:

> When a statute is plain and unambiguous, a court must give effect to its express language, rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statute's language is clear, there is no need to resort to statutory construction.[19]

---

[15] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[16] *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

[17] *Id.* at 185 (emphasis added).

[18] *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

[19] *Id.* at Syl. ¶ 3.

Moreover, in *Casco*[20], the Kansas Supreme Court overturned 75 years of precedent on the basis that earlier decisions did not follow the literal language of the Act. The Court wrote:

> When construing statutes, we are required to give effect to the legislative intent if that intent can be ascertained. When a statute is plain and unambiguous, we must give effect to the legislature's intention as expressed, rather than determine what the law should or should not be. A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute.[21]

Despite the Kansas Supreme Court's clear signals to follow the literal language of the Act, it is not for this Board to substitute its judgment for that of the appellate courts. Consequently, the Board is compelled to follow the law set forth in the above-cited cases until they are modified or overturned by other appellate decisions.

The evidence establishes that Dr. Holterman and his wife intended to retain claimant in respondent's employ until claimant erupted on August 16, 2004. Accordingly, the Board concludes claimant's actions were tantamount to failing to make a good faith effort to retain her employment with respondent and, therefore, the wages she was earning while working for respondent should be imputed to her for purposes of the permanent partial general disability formula of K.S.A. 44-510e. There is lack of proof that claimant had any wage loss between the date of her injury on April 7, 2004, and August 16, 2004, when she left respondent's employment. The Board concludes claimant's permanent partial general disability benefits are limited to her 10 percent whole person functional impairment.

In conclusion, the Award must be modified to award claimant a 10 percent permanent partial general disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[22] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

---

[20] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

[21] *Id.* at Syl. ¶ 6.

[22] K.S.A. 2006 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the October 3, 2007, Award entered by Judge Fuller.

Charlotte R. Doherty is granted compensation from Spencer-Randall Veterinary Clinic and its insurance carrier for an April 7, 2004, accident and resulting disability. Based upon an average weekly wage of $505.67, Ms. Doherty is entitled to receive 5.71 weeks of temporary total disability benefits at $337.13 per week, or $1,925.01, plus 41.50 weeks of permanent partial general disability benefits at $337.13 per week, or $13,990.90, for a 10 percent permanent partial general disability, making a total award of $15,915.91, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Dallas L. Rakestraw, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge